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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THOMAS JOSEPH AYERS et al.,

Plaintiffs and Appellants,

v.

WASHINGTON MUTUAL BANK,

Defendant and Respondent.

D045788

(Super. Ct. No. GIC816394)

APPEAL from an order of the Superior Court of San Diego County, William C. Pate, Judge. Reversed.

Plaintiffs and appellants Thomas Joseph Ayers and Larry Crober sued defendant and respondent Washington Mutual Bank (Washington Mutual), claiming damages resulting from a foreclosure sale. Ayers and Crober dismissed the case shortly before trial. Based on an attorney fees clause in the contracts between the parties, Washington Mutual was awarded \$83,297.15 and \$7,803.00 in costs. Ayers and Crober appeal,

arguing the attorney fees should not have been awarded and alternatively that the amount was excessive.

BACKGROUND

A. Mortgage, Promissory Note, Foreclosure

In 1993 Ayers and Crober purchased real property in Alpine. A loan was obtained from Washington Mutual's predecessor in interest and a note was executed in the amount of \$243,900.

Ayers and Crober were in default on the loan throughout its life. Washington Mutual's predecessor in interest commenced foreclosure proceedings. A foreclosure sale was set for October 12, 2000. Over the next several years foreclosure sales were set but Crober and Ayers petitioned for bankruptcy and then dismissed the petitions or paid the amounts owed only to again fail to make payments. A foreclosure sale went forward on July 16, 2003.

B. Suit

On August 18, 2003, Ayers and Crober sued Washington Mutual and U. S. Financial, the purchaser of the property. Based on a claim of "wrongful foreclosure," they sought damages and other remedies. Ayers and Crober asked the court set aside the foreclosure, quiet title against U. S. Financial, enjoin U. S. Financial's unlawful detainer action against them, order an accounting from Washington Mutual, award damages against both defendants for the intentional or negligent infliction of emotional distress, for breach of contract and for breach of the implied covenant of good faith and fair dealing. In April 2004 Ayers and Crober, pursuant to a settlement, dismissed U. S.

Financial from the suit. The day before trial, Ayers and Crober dismissed the complaint as to Washington Mutual.

C. Motion for Attorney Fees

On September 10, 2004, Washington Mutual, citing Code of Civil Procedure section 1032 and Civil Code section 1717, filed a motion seeking its attorney fees pursuant to various provisions of the deed of trust and the promissory note.

Ayers and Crober opposed the motion, arguing the attorney fee provisions of the subject documents were narrowly drawn and only applied to protect the lender's rights in the property. Ayers and Crober argued that after the sale of the property Washington Mutual ceased to have any property rights and, thus, the attorney fee provisions of the document on which Washington Mutual relied did not apply to the lawsuit filed by Ayers and Crober after the sale of the property.

The trial court concluded the language of the operative documents was sufficiently broad to entitle Washington Mutual to its attorney fees in defending against Ayers and Crober's noncontract claims in the amount of \$83,297 and \$7,803 in costs.

DISCUSSION

Ayers and Crober argue the fees and costs language of the deed of trust and promissory note do not authorize the award of attorney fees for noncontract causes of action and the trial court, therefore, erred in awarding them to Washington Mutual.

1. Law

"If a contractual attorney fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both

contract and tort claims: '[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.' [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

Civil Code section 1717 controls the operation of contractual attorney fee provisions dealing with the enforcement of a contract. Subdivision (a) of that section states in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the [prevailing party on the contract, whether a party specified in the contract or not is entitled to reasonable attorney fees]."

Subdivision (b)(2) of that section states: "Where an action has been voluntarily dismissed . . . , there shall be no prevailing party for the purposes of this section." The subdivision, however, controls only attorney fee provisions dealing with the enforcement of the contract, it does not control broadly worded fee provisions dealing with the award of attorney fees in actions or portions of actions dealing with tort or other noncontract claims. (*Santisas v. Goodin, supra*, 17 Cal.4th at pp. 610-615, 619; *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449-450.)

When no extrinsic evidence is offered to interpret the contracts and the facts are not in dispute, the reviewing court determines de novo whether the party awarded attorney fees is entitled to them. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705.)

2. Discussion

The trial court awarded Washington Mutual attorney fees for defending against the noncontract claims made in Ayers and Crober's suit. The general issue here is whether the attorney fee provisions of the deed of trust and the promissory note were such that they applied to Washington Mutual's defense to causes of action brought by Ayers and Crober in their suit.

Washington Mutual based its motion for attorney fees on several provisions of the deed of trust and the promissory note. Paragraph 7 of the deed of trust states in relevant part: "If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws and regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include . . . paying reasonable attorneys' fees. . . .

"Any amounts disbursed by Lender under paragraph 7 shall become additional debt of the Borrower."

Paragraph 21 in relevant part states: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21 [breach of agreement, acceleration, foreclosure], including, but not limited to, reasonable attorneys' fees."

Paragraph 6(E) of the promissory note states in relevant part: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have

the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees."

Implicit in the parties' approach to the case is the requirement we characterize the various causes of action in the suit. "It is well settled that while a contract action protects a party's interest in having promises performed, '[a] tort action . . . redresses the breach of the general duty to society which the law imposes without regard to the substance of the contractual obligation.' [Citation.]" (*Exxess Electronixx v. Heger Realty Corp.*, *supra*, 64 Cal.App.4th at p. 711.)

However broad the attorney fee provisions of the deed of trust and promissory note may or may not be, they clearly apply at least primarily to Ayers and Crober's promises to perform and to Washington Mutual's actions should they fail to do so. Ayers and Crober's causes of action to set aside the foreclosure sale, to quiet title, to enjoin the unlawful detainer issued against them, for an accounting for breach of contract and for breach of the implied covenant of good faith and fair dealing and Washington Mutual's defenses to them all arise from and deal with the parties' rights and obligations under the provisions of the deed of trust and promissory note. They are, therefore, contractual in nature.

Because all of the listed causes of action deal with an "action on a contract," any right to attorney fees under the provisions of the applicable contracts ceased to exist pursuant to Civil Code section 1717, subdivision (b)(2), when Ayers and Crober

voluntarily dismissed their suit. Washington Mutual was not entitled to attorney fees in defending against the causes of action listed in the paragraph above.

Ayers and Crober did allege two tortious causes of action, i.e., the intentional infliction of emotional distress and the negligent infliction of emotional distress.

The parties' argument concerning whether the contractual fee provisions relied on by Washington Mutual are broad enough to include tort claims is controlled by *Santisas v. Goodin*, *supra*, 17 Cal.4th at pp. 603, 608, 622, footnote 9, and *Rosen v. Robert P. Warmington Co.* (1988) 201 Cal.App.3d 939, 941-944, and is nothing more than an argument about the scope of the attorney fee provisions in the deed of trust and the promissory note. Washington Mutual contends the attorney fee provisions in those documents are broad and provide a basis for the recovery of all fees except those attributable to the contract causes of action. Ayers and Crober disagree, arguing Washington Mutual was entitled only to fees expended to protect Washington Mutual's property rights, rights that ceased to exist after its sale of the property to U. S. Financial.

In determining the scope of an attorney fee provision, "we apply the ordinary rules of contract interpretation. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation.

[Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation.

[Citation.] Thus, if the meaning a layperson would ascribe to contract language is not

ambiguous, we apply that meaning. [Citations.]" (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 608.)

We conclude the fee provisions in the deed of trust and promissory note were not intended to authorize the awarding of attorney fees in actions alleging the infliction of emotional distress.

In *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 744, the court in reviewing contractual fee provisions that supported awards for tort claims noted: "[F]or example, an attorney fee provision applicable to 'any dispute under the agreement' is sufficiently broad to include the assertion of a contractual defense to fraud and breach of fiduciary duty causes of action. (*Thompson v. Miller, supra*, 112 Cal.App.4th at pp. 335-337.) Such an attorney fee provision is not limited to an action brought to enforce the agreement. Other broad language has also been interpreted broadly to include tort actions. (*Santisas v. Goodin, supra*, 17 Cal.4th at p. 607 ['arising out of the execution of the agreement']; *Allstate Inc. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799 ['relating to the demised premises']; *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 ['relating to' the contract']; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 ['to which "this Agreement gives rise"].)"

There is no such broad language in the contracts in this case. The fee provisions are concerned with attorney fees for enforcing obligations under the contracts or defending rights. There is no language in the provisions arguably providing for the payment of attorney fees expended in the defense of tort actions.

The order awarding attorney fees is reversed. Appellants to recover their costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.